

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FILED

OCT 10 2003

United States of America,

Petitioner,

**NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT**

Misc. No. 02-0295 (TFH)

v.

KPMG LLP,

Respondent.

Report and Recommendation

The Special Master has examined all the remaining documents and supplemental submissions, and reexamined the privilege log, the entire record including the affidavits, transcripts and exhibits, and Judge Hogan's Memorandum Opinion of December 20, 2002.

The remaining documents, including those in which KPMG claims its own privilege, are sought to be exempt from disclosure under 26 U.S.C. § 7525, the attorney-client privilege or the attorney work product privilege. Many are claimed to be exempt under multiple privileges; viz, the attorney-client and attorney work product privileges; the attorney-client and § 7525 privileges; the attorney work product and § 7525 privileges and some under all three privileges. This Report and Recommendation shall

address all the documents individually and in numerical order by grouping under the claimed privilege or privileges.

The following legal standards have been applied when reviewing each of the documents to determine the applicability of the claimed privilege or privileges.

Attorney-Client Privilege:

In order for the attorney client privilege to be successfully invoked, the party asserting the privilege must show that

- (1) the holder of the privilege is or sought to become a client;
 - (2) the person to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer;
 - (3) the communication relates to a fact of which the attorney was informed
 - (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
 - (4) the privilege has been (a) claimed and (b) not waived by the client.
- (citation omitted) Memorandum Opinion, Judge Hogan, December 20, 2002, p. 9

The 26 U.S.C. § 7525 Confidentiality Privilege:

Relying primarily on the 7th Circuit's United States v. Frederick's opinion 182 F. 3d 496 (7th Cir. 1999), cert. denied, 528 U.S. 1154 (2000), Judge Hogan held that the §7525 confidentiality privilege “protects communications between a taxpayer and a federally authorized tax practitioner ‘to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.’” Moreover, “(t)he new statute ‘does not protect work product’ and ‘the privilege does not protect communications between a tax practitioner and a client simply for the preparation of a tax return.. See also, e.g. United States v. Lawless, 709 F2d 485, 488 (7th Cir. 1983)”

Memorandum Opinion, Dec. 20, 2002, p.8. Thus, essentially, there must be a showing that the holder of the privilege communicated with a tax practitioner for the purpose of securing an opinion or tax advice on a tax matter.

The Work Product Privilege:

"The work product privilege protects written materials lawyers prepare 'in anticipation of litigation'. FED. R. CIV. P. 26 (b) (3). By insuring that lawyers can prepare for litigation without fear that opponents may obtain their private notes, memoranda, correspondence, and other written materials, the privilege protects the adversary process. See In re Sealed Case, 323 U.S. App. D.C. 233, 107 F. 3d 46, 51 (D.C. Cir. 1997)" In re Sealed Case, 330 U.S. App. 368, 146 F. 3d 881, 884 (D.C. Cir 1998).

Explaining, the Court went on to say that "(t)he 'testing question for the work product privilege, ...is 'whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation,' (citations omitted). For a document to meet this standard, the lawyer must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable. (citations omitted). 146 F. 3d at 885.

The issue in In re Sealed Case was whether a "'specific claim' must have arisen at the time the lawyer prepared the documents before a court can conclude that they were in fact prepared 'because of the prospect of litigation' 146 F. 3d at 887. Under such circumstances, "... the absences of a specific claim represents just one factor that the courts should consider in determining whether the work-product privilege applies." 146 F. 3d at 887.

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Documents Claimed To Be Subject To The Attorney Client Privilege

The Special Master has examined the following documents for which the attorney client privilege is claimed and, under the applicable law, makes the following findings and recommendations.

Documents 281 and 358 are faxes from a client to an attorney reciting facts and requesting an opinion or legal advice. They have been shown to contain the essential elements of the attorney client privileged document. It is recommended that they need not be produced.

Document 606 is an e-mail from a KPMG member discussing legal advice given by the Office of General Counsel regarding a legal matter. It appears that the corporate lawyer was acting in a legal capacity providing legal advice and not business advice. The fact that the advice was given by in-house counsel does not vitiate the privilege provided the communication concerned a legal matter and not a business matter or business advice. An examination of the document discloses that it falls within the attorney client privilege. It is recommended that it need not be produced.

Document 776 is a fax memorandum from a KPMG member to a client summarizing a conference telephone call with attorneys from two law firms, a member of another accounting firm and a third party regarding a statutory merger of two entities into a third entity. The memo discusses a reorganization to allow a contribution to a newly created private foundation. This memo discloses no legal opinions or advice. It merely

summarizes investment and business matters. It has not been shown to be subject to the attorney client privilege. It is recommended that it be produced.

Documents 863 and 864 are an exchange of e-mails between KPMG members in which they discuss, among other things, legal advice requested and received from the Office of General Counsel about a legal matter. These documents have been shown to fall within the attorney client privilege. It is recommended that they need not be produced.

Document 865. This document consists of an e-mail exchange. It is a duplicate of Document 1028. Judge Hogan has ruled that he is "unable to determine if the e-mail(s) are related to legal advice or merely to a business decision". and, therefore concluded that KPMG had failed to establish that the privilege extends to Document 1028. Memorandum Opinion, Dec. 20, 2002, p 20. The same reasoning applies with respect to Document 865. It is recommended that it be produced.

Documents 866 and 1029 are duplicates and consist of an exchange of e-mails between KPMG personnel and an attached draft letter agreement to a third party. The e-mail was addressed to six KPMG personnel including the Office of General Counsel. The e-mails state that the attached agreement reflects changes made during an earlier telephone discussion.. The affidavit of John Bauman, an attorney in the Office of General Counsel (OGC) states " (T)he emails in document 866 contain _____'s request for my legal opinion ... regarding the draft agreement with the _____ that is attached to the emails... The communications reflected in this document relate to my legal advice to KPMG..." However, nothing in the e-mails discloses any request for legal advice or

assistance. Nor is any legal advice or assistance provided in any of the e-mails. Therefore, the privilege has not been shown to exist as to the e-mails. Nevertheless, the attached agreement was modified, according to Mr Bauman's affidavit, based in part on his legal advice. Therefore, based on this affidavit, the attorney client privilege has been shown to exist as to the draft agreement. It is recommended that the e-mails be produced but that the draft agreement need not be produced.

Document 868 is an e-mail which discusses changes made to a document prepared by counsel. There is no showing that the document contains anything based on legal advice. Notwithstanding John Bauman's affidavit, the e-mail in my view discusses business matter changes made in order to bring finality to a business arrangement. The attorney client privilege has not been shown to be applicable. It is recommended that this document be produced.

Document 869 is an exchange of e-mails. This document contains legal advice by legal counsel regarding a legal matter following an inquiry by a client. It has been shown to fall within the attorney client privilege. It is recommended that it need not be produced.

Documents 882, 886, 1134, 1135, 1194 and 1195 are similar in that they contain a series of e-mails regarding an engagement letter. The series begins with **Document 1135**. There is no showing that this document contains any legal advice or opinion from a lawyer or request for legal assistance by a client in a legal proceeding. Moreover, there is no showing of tax advice to a tax payer so as to render the document privileged under § 7525. It is recommended that it be produced.

Document 1134 is the same as Document 1135 except for one additional e-mail. That additional e-mail, dated Aug. 5, 1998 at 10:52pm, requests legal advice beginning with the phrase "Is it permissible . . ." (second sentence of the first paragraph) and concluding with the word "paid". (last sentence of the first paragraph). While these sentences contain a request for legal advice so as to bring them within the scope of the attorney client privilege, the remainder of the document neither requests or contains any legal advice or opinion. With the three sentences redacted in Document 1134, it is recommended that the document be produced in redacted form. There is no showing that tax advice was provided so as to bring them within the § 7525 privilege.

Document 882 contains the same e-mails found in **Documents 1134** plus an additional e-mail from one KPMG member to another. Although this new e-mail, dated Aug 5, 1998 at 3:22 pm, discusses a legal issue and a lawyer from the Office of General Counsel's Office is copied in, the e-mail neither seeks response or assistance from a lawyer with respect to this legal issue. The issue, although legal, is discussed as it relates to a business matter. Even the e-mail itself begins with the phrase "As a business matter, you and ___ could agree to raise..... However, you should not agree to reduce...." The lay author's conclusion is a definitive factual statement not shown to be subject to the attorney-client privilege. It is recommended that it be produced subject to the redaction discussed earlier with respect to the e-mail of Aug. 5, 1998 at 10:52pm (**Document 1134**). (That same e mail is found in Document 882 but bears a transmission date of Aug 5, 1998 @ 1:52pm)

Document 886 (both the attorney client privilege and § 7525 privileges are claimed.) is the same as Document 882 (for which only the attorney client privilege is claimed) except for the inclusion of one additional e- mail dated Aug. 6, 1998 at 1:02pm

from a lawyer in the OGC. That additional email has been shown to contain marginal legal advice in response to the request found in the previously discussed Aug. 5, 1998 at 10:52pm email.(Document 1134)(The e-mail of Aug 5, 1998 @ 10:52 am in Document 1134 is the same e-mail dated Aug 5, 1998 @ 1:52 pm in Document 886). Since this document differs from Document 882 only by the inclusion of the e-mail of Aug. 6 which has been shown to be marginally subject to the attorney client privilege, it is recommended that it need not be produced. The new e-mail of Aug 6 contains no tax advice on a tax matter. Therefore, the § 7525 privilege has not been shown to be applicable.

Document 1194 is a continuation of the e-mails found in **Documents 1134, 1135, 882 and 886** with a response from a lawyer in the Office of General Counsel dated Aug 15, 1998 at 8:34am which contains a legal opinion. This e-mail has been shown to be subject to the attorney client privilege. It is recommended that this document need not be produced.

Document 1195 is the last in this series of e-mails It memorializes a decision transmitted to a client. This e-mail contains no request for legal advice or opinion on a legal matter nor is any provided. It has not been shown to be subject to the attorney client privilege. It is recommended that this document be produced subject to the redaction in the e-mail discussed with respect to **Document 1134**.

Documents 1019, 1022 and 1023 are similar to Documents **1020, 1021 1024 and 1025** about which Judge Hogan said that "the Court cannot confidently state that the privilege applies". The same can be said with respect to Documents **1019, 1022, and 1023** which appear to relate to business matters rather than to contain legal advice. The Special

Master "cannot .. confidently state that the privilege applies". Memorandum Opinion, Dec. 20, 2002, pp 19, 20. It is recommended that they be produced.

Document 1026 is part of a series of e-mails exchanges referring to conversations with legal counsel regarding a draft agreement. It is the same as Document 1028 except for the inclusion of three additional e-mails. Judge Hogan concluded that he was unable to find the attorney client privilege applicable to Document 1028. The same is true of Document 1026 with the exception of the last sentence in an e-mail dated Aug. 20 at 10:10 am which makes reference to legal counsel; that one sentence may be redacted. It is recommended that Document 1026 be produced with the one sentence redaction.

Document 1027 contains portions of Documents 866 and 1026. Based on the affidavit of John Bauman, OGC, the attachment has been shown to fall within the scope of the attorney client privilege (see discussion of Document 866). The attachment is an amendment to an operating agreement. The e-mail discusses business matters and contains no legal advice or opinion other than the one innocuous sentence referred to in the discussion of Document 1026. It is recommended that this document be produced subject to the one sentence redaction and the redaction of the attached operating agreement.

Document 1030 is an e-mail. Although it is claimed to be privileged, it contains no legal advice or opinion but rather an editorial revision. This document has not been shown to be privileged. It is recommended that it be produced.

Document 1031 is an e-mail cover sheet accompanying a draft document. The privilege logs assert that the e-mail and attachment are subject to the attorney client privilege. The e-mail, which is directed to legal counsel as well as others, requests comments from each recipient. In effect the sender is requesting each addressee to comment from his expertise perspective. Thus, the lawyer addressee is requested to comment on the legal aspects of the draft attachments. There is a sufficient showing to invoke the attorney client privilege with respect to the attachments. However, the e-mail cover sheet has not been shown to be subject to the attorney client privilege. It is recommended that the e-mail cover be produced but that the draft attachments to the e-mail need not be produced.

Documents 1032 and 1033 are similar and consist of e-mails attached to which are several versions of a draft agreement. The e-mails discuss which version, from a business perspective, should be used. Although legal counsel is copied in no legal advice or opinion is sought, notwithstanding John Bauman's, OGC, belief as expressed in his affidavit, instead business related comment is sought. The e-mail requested the recipients to select one of the three options offered from a business standpoint. There is an insufficient showing to rule that these documents are subject to the attorney client privilege. It is recommended that they be produced.

Document 1121 and 1122 are a duplicate series of e-mails between KPMG personnel. The initial e-mail discuss in general terms an agreement form and says that the form was transmitted for comment. These documents did not contain the agreement form. Although the OGC is copied in and asked to comments none of the reply e-mails contain

any response from legal counsel and the request for comment is very general and not specific. The e-mails themselves contain no facts upon which a legal opinion is sought and no legal opinion is provided. These documents have not been shown to fall within the scope of the attorney client privilege. It is recommended that these documents be produced.

Document 1123 is a hand written note memorializing a discussion between KPMG personnel including legal counsel. John Bauman, OGC, states in his affidavit that his legal opinion was requested with respect to one area and that the document reflects his legal advice. It is difficult to read these handwritten cryptic notes but based on the affidavit, the attorney client privilege has been shown to established. It is recommended that this document need not be produced.

Documents 1126, 1127 and 1128 are similar e-mail cover sheets. Although legal counsel is copied in, the e-mails appear to discuss business related matters rather than legal issues or matters. The agreements to which the e-mails refer are not a part of this document. Therefore, based solely on the e-mails, KPMG has not shown that the attorney client privilege is applicable. It is recommended that these documents be produced.

Document 1147 is similar to Document 1144. Judge Hogan ruled that Document 1144 has not been shown to be privileged. The same is true of Document 1147. It is recommended that it be produced.

Document 1163 is a cover letter e-mail with a draft analysis of a tax matter. The document was forwarded to legal counsel for comment or opinion. The document communicates information to a lawyer for the purpose of obtaining a legal opinion or for assistance in a legal matter. The necessary showing has been made to protect this document from disclosure under the attorney client privilege. It is recommended that it need not be produced.

Documents 1169, 1170, 1171, 1172 and 1173 are a series of e-mail exchanges similar to Documents 1020, 1021, 1024, 1025, 1028, 1145 and 1146 discussed by Judge Hogan in his analysis of the attorney client privilege on pages 19 to 21 of his memorandum opinion. Although legal counsel is included in the exchange, it is not clear that counsel's involvement was other than as a business advisor. It can not be said with any degree of confidence that legal advice or assistance was sought or given so as protect these document under the attorney client privilege. It is recommended that they be produced.

Document 1178 is an e-mail with a copy of a draft alliance agreement. The attachment is claimed to be privileged. Although legal counsel was included in the distribution, no showing has been made that legal advice or counsel was sought or given. The attachment is nothing other than a template business agreement. KPMG has not made a sufficient showing that this document is privileged under the attorney client privilege. It is recommended that it be produced.

Document 1179 is an e-mail similar to Document 1025. However, it contains a multi-paged form attachment. The form is a business document prepared by a sponsoring partner and circulated among various KPMG personnel for comment on a prospective business relationship. It is strictly a business document which seeks no legal advice, opinion or assistance. There has been an insufficient showing that this document is subject to the attorney client privilege. It is recommended that it be produced.

Documents 1181, 1182, 1184, 1185, 1186, 1187, 1188, 1215 and 1216 consist of a series of e-mails written over a two week period of time. The e-mails discuss a draft of a marketing agreement. The draft is not attached nor is there anything other than a fleeting reference to its contents. These e-mails discuss what appears to be business matters. However, the agreement apparently contained some matter which attracted legal counsel's attention because he responded with three e-mails only one of which contains what might be considered legal advice. That advice is contained in an e-mail dated Aug. 11, 1998 at 6:01 pm. KPMG has not made a sufficient showing that any other portion of the documents is protected from disclosure under the attorney client privilege. It is recommended that these documents be produced subject to the redaction of the Aug. 11, 1998 at 6:01 pm e-mail from legal counsel.

Document 1183 consists of the same e-mails contained in Documents 1181 and 1182 plus an additional e-mail from legal counsel. The additional e-mail contains no legal advice, opinion or assistance. Counsel's comments relate to issues arising under accounting guidelines and to business related matters. The Aug 11, 1998 at 6:01 pm discussed with respect to Document 1181 is part of this package of e-mails and may be

redacted. The remaining e-mails including the new e-mail of Aug. 13, 1998 at 12:23 pm from counsel have not been shown to be protected from disclosure under the attorney client privilege . It is recommended that this document be produced subject to redaction.

Document 1191 is similar to Document 1145. Judge Hogan ruled that KPMG has not shown that Document 1145 is subject to the claimed attorney client privilege. The same privilege is sought to preclude production of Document 1191. The reasons stated by Judge Hogan are equally applicable to this document. KPMG has not shown that this document is subject to the attorney client privilege. It is recommended that it be produced.

Document 1198 is an exchange of e-mails between KPMG personnel regarding the terms of a confidentiality agreement. The agreement is not attached and the e-mails themselves neither seek nor offer any legal advice or opinion. KPMG has not made a sufficient showing that this document is privileged. It is recommended that it be produced.

Document 1199 contains three copies of nine pages of e-mails plus a cover sheet. The e-mails contain a discussion of an agreement with Presidio as well as the treatment of OPIS matters. Although the whole document is claimed to be subject to the attorney-client privilege, only two of the e-mails even make reference to legal counsel.

The third paragraph in an e-mail dated June 5, 1998 at 11:40AM (FOP 037251) discloses legal advice regarding a legal matter and the fourth and last paragraph of an e-mail dated June 3, 1998 at 1:13PM (FOP 037251) seek legal advice. While the fourth paragraph in the June 3, 1998 e-mail (FOP 037251) discusses legal relationships, there is no showing that this terminology was provided by legal counsel in response to a request.

However, the paragraph concludes with a determination to seek legal counsel with respect to this issue. Thus, the paragraph has been shown as a request for legal assistance..

In the last paragraph of the e-mail dated June 3, 1998 at 1:13PM, the author requests the legal opinion of legal counsel with respect to "the attachment"; the document does not contain "the attachment". However, the same e-mail including the attachment is found in Document 1221. Read collectively a showing has been made of a specific request from legal counsel for legal advice regarding a legal matter. The remainder of the document neither seeks nor provides any legal advice or opinion so as to subject it to the attorney-client privilege. It is recommended that Document 1199 be produced subject to the redaction of the second paragraph of the e-mail of June 5, 1998 at 11:40AM (FOP 037251), and the fourth as well as last paragraph of the e-mail dated June 3, 1998 at 1:13PM (FOP 037251) including the duplicate copies of that e-mail found at pages FOP 037247 through 037249, FOP 037257 through 037259 and FOP 037267 through 037269.

Document 1200 consists of another ten pages of e-mails including the June 3 e-mail referred to in the discussion of Document 1199. "(T)he attachment" referred to in the June 3 e-mail is not included in this document (FOP 037281 and FOP 037286), but as discussed earlier it is attached to another similar document. Therefore, the discussion and recommendation made with respect to that portion of Document 1199 is equally applicable to this document. Aside from the three paragraphs previously discussed (the last paragraph of the June 5,1998 @ 11:40am e-mail, the fourth and last paragraphs of the June 5, 1998 @ 1:13pm), none of the e-mails have been shown to be subject to the attorney-client privilege. The e mails discuss business matters and to the extent ththey discuss legal issues, it is a layman's discussion and not that involving professional legal

advice or assistance. Therefore, it is recommended that Document 1200 be produced subject to redaction of the last paragraph of the June 5 e-mail and the fourth paragraph and last paragraphs of the June 3 e-mail (FOP 037280 and 037281; FOP 037285 and 037286).

Document 1201 consists of two e-mail messages and an attached confidentiality agreement. The e-mails disclose legal advice from legal counsel on a legal issue. This document has been shown to be protected from disclosure by the attorney client privilege. It is recommended that the document need not be produced.

Document 1202 consists of duplicate copies of a fax cover sheet to which is attached a letter with hand written comments. This document from the Office of General Counsel to a KPMG member provides legal advice on a legal issue. It has been shown to be protected from disclosure by the attorney client privilege. It is recommended that it need not be produced.

Document 1203 consists of duplicate copies of an e-mail from associate general counsel to a KPMG member containing legal advice on a legal issue. It has been shown to be subject to the attorney client privilege and it is recommended that it need not be produced.

Document 1204 is a series of e-mails some of which contain hand written notes. The e-mails dated June 3 at 1:13PM (Document 1199) and June 5 at 11:40AM (Document 1199) are contained in this document. What was said about those e-mails when discussing Document 1199 is equally applicable here. Aside from those portions of the June 3 and

June 5 e-mails (FOP 037301 and FOP 037306) previously discussed with respect to Document 1199, it has not been shown that the remainder of the e-mails and hand written notes in Document 1204 either seek or provide legal advice, opinion or assistance on a legal matter. Therefore, it is recommended that Document 1204 be produced subject to the redactions discussed with respect to Document 1199.

Document 1205 contains many of the same e-mails contained in Documents 1199, 1200 and 1204 with hand written notes. It has not been shown that hand written notes contain any request for legal opinion on a legal matter so as to subject the document to the attorney-client privilege. The e mails discuss business matters and policies and contain neither a request for or advice from legal counsel on a legal matter. It is recommended that this document be produced subject to the redaction of the fourth and last paragraph of the June 3 e-mail (FOP 037314 and FOP 037318) discussed with respect to Document 1199(the June 5 e-mail is not included in this batch).

Document 1207 is an exchange of e-mails between KPMG personnel. Only the e-mail dated Sept. 1, 1998 at 1:06PM from legal counsel (FOP 037326 and FOP 037327) contains legal advice with respect to a legal matter. The remainder of the document discusses business matters not protected by the attorney client privilege. It is recommended that this document be produced subject to the redaction of the e-mail of Sept. 1, 1998 at 11:06 PM.

Document 1208 is an exchange of e-mails which discuss an attached engagement letter (not attached to the document) and anti-virus software. There is no showing that this

document contains a request for legal opinion from legal counsel regarding a legal matter so as to protected from disclosure by the attorney-client privilege. It is recommended that it be produced.

Document 1209 is an e-mail to which is attached a detailed analysis of the tax matter. The e-mail itself is merely a covering letter sent to the National Partner in Charge. The e-mail has not been shown to be subject to the attorney client privilege. However, the attachment was also sent to legal counsel for comment, advice and opinion on a legal matter. The attachment to the e-mail has been shown to be protected from production by the attorney client privilege. It is recommended that the e-mail portion of the document be produced but that the attached analysis of a legal issue need not be produced.

Document 1211 consists of three email and a KPMG prospective business relationship form. The business relationship form is strictly a business matter form and appears to be a prelude to the preparation of a contract. The business relationship form discusses no legal issues or matters. It has not been shown to be protected from production by the attorney client privilege. The e-mails directed to legal counsel, among others, request opinions about the contents of an agreement (not the attached business relationship form) with an entity with whom KPMG hopes to form a business relationship. However, the agreement referred to in the e-mails was not a part of this document and the e-mails themselves disclose no facts or factual matters upon which a legal opinion is sought. At best the e-mails merely reference sections of the agreement by number and letter but disclose no other factual information. If the e-mails were accompanied by the agreement the combination may very well have been shown to be protected by the

attorney-client privilege. But the e-mails, in and of themselves, fail to disclose facts or information about which a legal opinion or advice is sought. These e-mails are merely a discussion of business issues prior to entering into a contractual agreement. It is recommended that this document be produced.

Document 1212 contains two e-mails in which KPMG members discuss the status of an agreement. In-house counsel is copied in on the response to an inquiry. Although a revised agreement with a third party is referred to the contents of that agreement are not disclosed. Nothing in the exchange discloses any facts upon which legal advice or opinion was requested nor do they disclose any legal advice or opinion on a legal matter. This exchange of e-mails merely resolves the status of a business matter. This document has not been shown to be protected from disclosure by the attorney client privilege. It is recommended that it be produced.

Document 1213 is the same as Document 1212 except for one additional short e-mail requesting a copy of the agreement discussed in Document 1212. The additional e-mail adds nothing to the document so as to preclude its production. It is recommended that this document be produced.

Document 1214. This series of e-mails between KPMG members discusses issues related to the consummation of an agreement with a third party as well as the status of

OPIS. The e-mails contain no request for legal advice or opinion; nor do they contain any legal advice or opinion on a legal matter. The e-mails relate solely to a discussion of business matters and the difficulties surrounding a resolution of business issues. There has been no showing that this document is subject to the protection of the attorney client privilege. It is recommended that it be produced.

Document 1217 is an e-mail attached to which is an engagement letter. The attachment is a final product incorporating previous changes recommended in a series of e-mails among KPMG members including the Office of General Counsel. There is no showing that legal advice is being sought with respect to the final product. This now becomes a business document involving a business matter and has not been shown to be subject to the protection of the attorney-client privilege. It is recommended that it be produced.

Documents **1218, 1219** are e-mail exchanges dated June 5, 1998 at 1:59pm and 2:20pm to and from legal counsel regarding a legal matter in which a legal opinion is given. These documents have been shown to fall within the protection of the attorney-client privilege. It is recommended that they need not be produced.

Documents 1220, 1222, 1223, 1224, 1225, 1229 and 1233 consist of a series of e-mails between KPMG members. The June 3 e-mail found in Document 1199 is part of

these documents as well as the June 4 at 11:13 AM e-mail found in Document 1200. None of these documents have been shown to be subject to the attorney-client privilege other than the fourth and last paragraphs of the June 3 e-mail (FOP 037408 and FOP 037421-22 and FOP 037437 and FOP 037434 and FOP 037440 and FOP 037 473 and FOP 037506) discussed previously with respect to Document 1199. The e-mails themselves consist of a discussion of business related matters and virus filters between two businessmen. Although legal counsel is copied in, legal comment, advice or opinion is sought only with respect to the attachment which is not a part of these documents. It is recommended that these documents be produced subject to redaction of the fourth and last paragraphs of the June 3 e-mail.

Document 1221 and 1228. The only difference between these documents and Document 1220 is the inclusion of the draft engagement letter and some additional e-mail exchanges. The June 3 e-mail request legal counsel's input on that letter, a legal document. The fourth paragraph of that e-mail (FOP 037412 and FOP 037462-63) (previously discussed with respect to Document 1199) also seeks legal advice on a legal matter. The respondent has shown that a portion of these documents are subject to the attorney client privilege. It is recommended that they be produced subject to the redaction of the fourth and last paragraphs of the June 3 e-mail and the attached engagement letter.

Document 1226, 1227, 1230, 1231 and 1232 are similar and consist essentially of the same e-mails found in Documents 1220 through 1225. However, they include an attachment not found in the other documents. This attachment is not the engagement letter found in Document 1221. It is an instruction sheet dated June 28, 1998 and first made reference to in an e-mail dated June 29. This attachment relates to business matters. It discusses KPMG's business policies. These documents have not been shown to be subject to the attorney client privilege. It is recommended that these documents be produced subject to the redaction of the fourth and last paragraphs of the June 3 e-mail (FOP 037446 and FOP 037455 and FOP 037 479 and FOP 037488 and FOP 037498) discussed earlier.

Document 1234 consist of an exchange of e-mails between two KPMG members to which is attached three draft alternative engagement letters. The e-mails discuss the billing and fee aspects of the drafts; issues which involve business related matters. Although legal counsel is copied in as are other KPMG members, legal advise or opinion is not requested or provided. It appears that legal counsel are copied for informational purposes notwithstanding John Bauman's (OGC) belief that by copying him in on the e-mail his legal assistance was being sought. It has not been shown that this document is subject to the attorney client privilege. It is recommended that it be produced.

Documents 1235, 1236 and 1237 are an exchange of e-mails. The initial e-mail (Document 1235) seeks comment on a monetary change and a proposed language change to an engagement letter. The response is from a KPMG member (Document 1236). Legal counsel's response is found in Document 1237. The initial e-mail seeks advice on a matter which is both business and legal. Legal counsel provided legal assistance. The documents have been shown to be subject to the attorney client privilege. It is recommended that they need not be produced.

Document 1238 is an e-mail inquiry from a KPMG member to other members with a copy to legal counsel. The e-mail concerns a business matter inquiry. There is no showing that legal advice or opinion has been requested or provided. KPMG has failed to show that this document is subject to the protection of the attorney client privilege. It is recommended that it be produced.

Document 1239 is an exchange of e-mails which report a KPMG member's reaction to a meeting with a representative of a state taxing authority. It neither seeks nor provides any legal advice. It is in the nature of an informational memorandum. It has not been shown to be subject to the protection of the attorney client privilege. It is recommended that it be produced.

Document 1240 is an exchange of e-mails in which an attorney from the Office of General Counsel merely conveys to a KPMG member facts acquired from a source other than his client. The document contains no legal advice or opinion. See: In Re Sealed Case, 737 F2d 94, 98-99, (D.C. Cir. 1984). KPMG has not shown this document to be protected by the attorney client privilege. It is recommended that it be produced.

Document 1241 is an e-mail from a KPMG member to others, including associate general counsel, conveying facts learned from a third party source. The e-mail seeks no legal advice or opinion on a legal matter. It discusses one aspect of the contents of a third party's engagement letter. It has not been shown to be subject to the attorney client privilege. It is recommended that this document be produced.

Document 1242 is another e-mail exchange between KPMG members in which factual information is transmitted. Although one of the e-mails refers to the attached draft document that draft is not attached to Document 1242. Moreover, the draft being discussed was prepared by the in house counsel of a third party, not KPMG's counsel. Although legal counsel is copied in on this e-mail, it appears that this is for informational purposes since no legal advice or opinion on a legal matter is either sought or given. It has not been shown to be subject to the attorney client privilege. It is recommended that it be produced.